Supreme Court, U.S.
FILED
JUN 27 1997
CLERK

No. 96-1891

In The

Supreme Court of the United States

October Term, 1996

M.R. MIKKILINENI, General Partner of Talasila,

Petitioner,

v.

CITY OF HOUSTON, TEXAS, DENIS LLOYD, RUSSELL MAI, PHILIP BARNARD, GARY ORADAT, UNITED STATES DEPARTMENT OF LABOR, JUAN PADRON, HAROLD DARK, JOHN LAWSON, and ROBIN HORNING,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI OF CITY OF HOUSTON, DENIS LLOYD, RUSSELL MAI, PHILIP BARNARD, and GARY ORADAT

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24 pp

QUESTION PRESENTED

Did the Fifth Circuit Court of Appeals deny petitioner's right to procedural due process of law when it granted Respondents' Motion to Dismiss his appeal because Petitioner, an uncounseled litigant, filed his *pro se* brief nine (9) days out of time?

LIST OF ALL PARTIES TO THE PROCEEDINGS

M.R. Mikkilineni – Petitioner/plaintiff

City of Houston – Respondent/defendant

Juan Padron – Respondent/defendant

Harold Dark – Respondent/defendant

John Lawson – Respondent/defendant

Robin Horning – Respondent/defendant

Denis Lloyd – Respondent/defendant

Russell Mai – Respondent/defendant

Philip Barnard – Respondent/defendant

Gary Oradat – Respondent/defendant

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents request that this Court deny the petition for a writ of certiorari seeking review of an opinion of the United States Court of Appeals for the Fifth Circuit, and present in support of their request:

STATEMENT OF THE CASE

Petitioner, M.R. Mikkilineni, originally attempted to file this lawsuit both *in forma pauperis* and *pro se* in October 1994. However, the district court denied his motion to proceed *in forma pauperis*. Mr. Mikkilineni based his action on an alleged violation of his due process rights as guaranteed under the Fourteenth Amendment to the United States Constitution and for breach of contract.

After discovery was conducted, respondents, City of Houston, Denis Lloyd, Russell Mai, Philip Barnard, and Gary Oradat, defendants and appellees below (collectively "City defendants"), filed a motion for summary judgment. At the time of the summary judgment, Mr. Mikkilineni was represented by counsel. The district court found that Mr. Mikkilineni's lack of material summary judgment evidence and his vague, conclusory, and incompetent evidence did not raise a genuine issue of material fact to show that the City defendants deprived him of a protected life, liberty, or property interest. Consequently, the district court granted summary judgment in favor of the City defendants on Mr. Mikkilineni's federal claims and remanded his state law claims for breach of contract against the City of Houston to state court.

Mr. Mikkilineni then sought to appeal the district court's judgment.

Before Mr. Mikkilineni's brief was due to be filed in the court of appeals, he requested an extension of time to file his brief. The City defendants did not oppose that motion, and the court of appeals granted an extension of seventy-four (74) days, but warned that no further extensions would be granted. On or about December 9, 1996, Mr. Mikkilineni sent the court of appeals a brief and record excerpts which exceeded the court of appeals' page limits for filing. The court of appeals did not file the brief and record excerpts, but marked them "received" on December 12, 1996. On December 13, 1996, the City defendants moved to strike Mr. Mikkilineni's brief and to dismiss his appeal. Mr. Mikkilineni responded by filing a motion for extension of time and to file a brief and record excerpts in excess of the page limits. The court of appeals denied Mr. Mikkilineni's motions and granted the City defendants' motion to dismiss. Mr. Mikkilineni now claims his right to due process as guaranteed by the Fifth Amendment to the United States Constitution was violated.

REASONS FOR DENYING THE WRIT

This case does not merit review by this Honorable Court. Petitioner has not established any of the considerations set forth in this Court's Rule 10. The decision rendered by the Court of Appeals for the Fifth Circuit does not conflict with any other decision of another Court of Appeals or of this Court. This case presents no important legal issue that this Court has not decided, but should decide. The actions of the lower courts were not of

such a nature as to call for an exercise of this Court's power of supervision.

ARGUMENT

The Court of Appeals for the Fifth Circuit below properly denied Mr. Mikkilineni's motions relating to his brief and record excerpts on January 28, 1997, and properly denied Mr. Mikkilineni's request for reconsideration of its order. The court of appeals also properly granted the motion to dismiss the appeal filed by respondents, City of Houston, Gary Oradat, Russell Mai, Denis Lloyd, and Philip Barnard. Contrary to Mr. Mikkilineni's belief, the Court of Appeals afforded him due process.

Mr. Mikkilineni suggests that the court of appeals treated him in a manner "inconsistent with its own basic sense of due process fairness in dealing with uncounseled appellants as is guaranteed by the Due Process Clause of the Fifth Amendment to the United States Constitution." Petition for a Writ of Certiorari at 5. However, the Court of Appeals did afford Mr. Mikkilineni due process. Mr. Mikkilineni filed a motion for extension of time to file his brief and record excerpts and a motion to file oversized brief and record excerpts. The City defendants, who had filed a motion to dismiss, responded to his motions. Mr. Mikkilineni then filed his reply to the City defendants' motions.

Mr. Mikkilineni would like this Court to believe that the Court of Appeals did not extend Mr. Mikkilineni any grace because it denied his motions. However, Mr. Mikkilineni ignores the fact that the court of appeals did grant his motion for extension to file his brief until

November 30, 1996, but also ordered that no further extension would be granted. Thus, his case is distinguishable from the cases he cites in support of his position.

I. Due process only requires an opportunity to be heard.

Due process requires that a litigant be afforded a meaningful opportunity to assert his claim. Basically, due process requires that a deprivation of life, liberty, or property be preceded by notice and opportunity for hearing appropriate to the nature of the case. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985). The denial of an actual, aural hearing does not violate due process rights where there are no issues which a hearing could illuminate. *See Travelers Ins. Co. v. St. Jude Hosp.*, 38 F.3d 1414, 1416 (5th Cir. 1994). All that due process requires in a civil case is proper notice and service of process. *New York Life Ins. Co. v. Brown*, 84 F.3d 137, 143 (5th Cir. 1996).

The court of appeals gave Mr. Mikkilineni the opportunity to be heard before it ruled on each of the motions of which he now complains. Indeed, Mr. Mikkilineni responded to each of these motions. On December 13, 1996, the City defendants filed their Motion to Strike Appellant's Brief and to Dismiss Appeal. On the same day, the court of appeals gave Mr. Mikkilineni notice that the matter would be presented for ruling without oral argument on December 20, 1996. *See* Appendix C. Mr. Mikkilineni had notice of the City defendants' motion and notice of when the motion would be presented for ruling. Mr. Mikkilineni responded to the City defendants'

motion and further filed his Motion for Leave to File Brief/Record Excerpts Out of Time, to File Oversize Brief of 68 Pages/Record Excerpts of 300 Pages. The court of appeals gave all parties notice that Mr. Mikkilineni's motion would be presented for ruling without oral argument on December 27, 1996. *See* Appendix D. Clearly, because the court of appeals gave Mr. Mikkilineni notice of the date on which the motions would be presented, Mr. Mikkilineni had ample opportunity to file responses so as to be heard. The Court of Appeals for the Fifth Circuit did not deny Mr. Mikkilineni due process by denying his motions and by granting the City defendants' motion to dismiss his appeal because Mr. Mikkilineni had the opportunity to be heard and filed responses so as to be heard.

II. Court of Appeals properly denied petitioner's motions and dismissed his appeal.

The Court of Appeals for the Fifth Circuit plainly sets forth the procedure by which it considers motions regarding the filing of briefs, including the brief's length and filing due date. *See* 5TH CIR. R. 26.2 and 28. Federal Rule of Appellate Procedure 31 (c) allows appellees to move for dismissal of an appeal where the appellant's brief is not timely filed. The court of appeals also provides guidelines whereby it may dismiss an appeal for failure to prosecute. *See* 5TH CIR. R. 42.

Despite the court of appeals' admonition that it would grant Mr. Mikkilineni no further extensions of time to file his brief, Mr. Mikkilineni attempted to file his brief nine (9) days after his new filing deadline. *See* Petitioner's Appendix 14a. Upon the court of appeals'

notice to him on December 12, 1996, Mr. Mikkilineni filed a second motion for extension of time. However, his motion did not comply with Rule 26 (b) of the Federal Rules of Appellate Procedure. Mr. Mikkilineni did not show good cause for his delay in filing his brief. Because Mr. Mikkilineni did not file his brief within his briefing deadline, the City defendants were entitled to move to dismiss his appeal. FED. R. APP. P. 31 (c).

Mr. Mikkilineni also moved for leave to file a brief in excess of the page limits and record excerpts in excess of the page limits. However, Mr. Mikkilineni did not comply with the court of appeals' local rules which require that when a party wishes to file a brief in excess of the fifty page limit, he must move for leave at least ten days in advance of the due date of the brief. 5TH CIR. R. 28.1. A violation of the rule limiting the length of the brief may result in a *sua sponte* striking of the briefs. *Neeley v. Bankers Trust Co.*, 757 F.2d 621, 634 n.18 (5th Cir. 1985). Although he mentions his brief's length in his letter to the court of appeals, Mr. Mikkilineni did not move for permission to file a brief in excess of the page limits until after some twenty days after his brief's due date, more than thirty days after the deadline to file such a motion.

The court of appeals clearly set forth the requirements for motions filed before it in its Local Rules, thereby giving Mr. Mikkilineni notice of its requirements. Mr. Mikkilineni did not comply with the requirements of the court of appeals. The court of appeals properly denied his motion for extension of time to file his brief and for leave to file a brief and record excerpts in excess pages and properly granted the City defendants' motion to dismiss.

III. Petitioner has not shown the court of appeals' decision conflicts with other decisions.

None of the cases upon which Mr. Mikkilineni relies to support his argument addresses the situation in which the appellant files a brief in excess of page limits. Some of the cases to which Mr. Mikkilineni cites do liberally construe the *pro se* appellant's brief. However, these cases do not conflict with the court of appeals' decision to deny him leave to file his brief and record excerpts or to dismiss his appeal.

Mr. Mikkilineni first refers to a case in which the court of appeals declined to dismiss a *pro se* appellant's appeal in a breach of contract action because, when liberally construed, the brief contained an assertion or trial court error. *Abdul-Alim Amin v. Universal Life Ins. Co.*, 706 F.2d 638, 640 (5th Cir. 1983). The issue before the court in that case was whether the statute of limitations barred appellant's cause of action. The court of appeals did not consider whether the appellant had timely filed his appellant's brief. Rather, the court of appeals decided that the appellant there articulated appealable error if his brief were liberally construed. The issue before this Court is not whether Mr. Mikkilineni articulated appealable error or whether his claims were time barred, but whether the court of appeals afforded him due process.

Mr. Mikkilineni referred to another case in which the court of appeals considered whether a *pro se* appellant waived his claim that his suit was not time barred because it lacked an argument. *Price v. Digital Equip. Co.*, 846 F.2d 1026, 1028 (5th Cir. 1988). The court of appeals liberally construed and reviewed that appellant's claim despite the inadequate brief which failed to brief appellant's argument. Again, the court of appeals did not

consider the timeliness of the filing of the deficient brief. The City defendants do not claim that Mr. Mikkilineni's brief was inadequate because he failed to brief issues, but rather, that he filed his excessively long brief and record excerpts late.

Mr. Mikkilineni also relies upon cases from other circuits such as *McCottrell v. E.E.O.C.*, 726 F.2d 350 (7th Cir. 1984). Although the Court of Appeals for the Seventh Circuit refused to dismiss that appeal because of a "woefully inadequate" brief which "sets forth a discernible, albeit unsupported, argument," the court warned that "*pro se* litigants should anticipate that [the Court of Appeals for the Seventh Circuit] may dismiss an appeal where the brief submitted contains no identifiable argument." *McCottrell*, 726 F.2d at 351. Again, nothing in the City defendants' motion to dismiss suggested that Mr. Mikkilineni's brief contained an unsupported or undiscernible argument, so *McCottrell* does not control.

Relying on *Balistreri v. Pacifica Police Dep't*, 855 F.2d 1421, 1424 (9th Cir. 1988), Mr. Mikkilineni argues that *pro se* litigants should not lose their right to a hearing on the merits of their claims due to ignorance of technical procedural requirements. Ms. Balistreri failed to follow that court of appeals' formal requirements for brief-writing, but because she articulated the challenge of the district court's ruling, that court of appeals considered her arguments. Although necessity of moving to file an excessively long brief may amount to a technical procedural requirement, Mr. Mikkilineni cannot claim ignorance of the court of appeals' requirements that the length of a principal brief not exceed fifty pages and that the length of the optional contents of record excerpts not exceed forty pages. Mr. Mikkilineni knew when he filed his brief

and record excerpts on December 9, 1996, that they were too long and late as evidenced by his cover letter. He also knew then that to file a brief and record excerpts out of time required a motion for extension of time because the court of appeals had advised him on September 4, 1996, that his first request to extend time to file his brief would be presented to the court for a ruling as a motion. Thus, Mr. Mikkilineni cannot claim ignorance of the court of appeals' procedural requirements with regard to his second motion for extension of time and the length of his brief and record excerpts.

Finally, Mr. Mikkilineni cites *Cramer v. Phoenix Mut. Life Ins. Co.*, 91 F.2d 141 (8th Cir. 1937). The Court of Appeals for the Eighth Circuit excused "a fully and satisfactorily explained and . . . purely accidental" delay in the filing of appellants' brief. *Cramer*, 91 F.2d at 144. The court of appeals, however, did not give further guidance as to what constituted an excused delay.

Contrary to Mr. Mikkilineni's representations to this Court, Mr. Mikkilineni's brief and record excerpts were not filed before the City defendants filed their motion to dismiss.[1] On December 12, 1996, the court of appeals informed Mr. Mikkilineni that his "brief and record excerpts have been received but not filed, since motions to file out of time and to file in excess of pages are required." Petitioner's Appendix 11a. Clearly, Mr. Mikkilineni's brief and record excerpts could not have been filed because the court of appeals merely "received" the

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[1] "Although he filed his lengthy brief nine days out of time, it was filed prior to the date when appellee's filed their motion to dismiss." Petitioner's Petition for a Writ of Certiorari at 6.

documents. *See* Appendix B. The City defendants filed their Motion to Strike Appellant's Brief and Dismiss Appeal on December 13, 1996, before Mr. Mikkilineni moved to file his late and lengthy brief and record excerpts. *See* Appendix C. Mr. Mikkilineni's only explanation for his delay in filing his brief was "it took more time than anticipated to frame the issues, list all the facts and make the argument such that it comes out presentable/ understanding to the reviewer; it could have been one better if there was a couple of weeks of more time available."

Unlike the appellant in *Cramer*, Mr. Mikkilineni did not file his brief before the City defendants filed their motion to dismiss. His delay in submitting his brief was not satisfactorily explained nor was it the result of any accident. He also attributed the length of his brief and record excerpts to time restraints, but gave no other reason for their excessive length. The court of appeals' action does not conflict with the holding in *Cramer*.

None of the cases relied upon by Mr. Mikkilineni show that the court of appeals acted in a manner which conflicts with other decisions by that court or any other court.

CONCLUSION

The Court of Appeals for the Fifth Circuit Court did not deny Mr. Mikkilineni due process of law by dismissing his appeal. The court of appeals afforded Mr. Mikkilineni due process before dismissing his appeal. Mr. Mikkilineni has not shown that the action of the court below warrants a review by this Court.

For all of the reasons set forth above, the petition for writ of certiorari should be denied.

Dated: June 27, 1997
Houston, Texas

Respectfully submitted,

ANDREA CHAN
Assistant City Attorney
(Counsel of Record)

P.O. Box 1562
Houston, Texas
713/247-1511
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Attorney for Respondents,City of Houston, Russell Mai, Denis Lloyd, Philip Barnard, and Gary Oradat

Of Counsel:

GENE L. LOCKE
City Attorney

CITY OF HOUSTON LEGAL DEPARTMENT
Members of the Texas Bar

APPENDIX A

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT
OFFICE OF THE CLERK

TEL. 504-589-6514
CHARLES R. FULBRUGE III 600 CAMP STREET
CLERK NEW ORLEANS, LA 70130

September 4, 1996

TO COUNSEL FOR APPELLEES

No. 96-20471 Mikkilineni v. The City of Houston USDC No. CA-H-94-3553

Regarding the case above, the following has been filed:

Motion filed by Appellant M R Mikkilineni to extend time to file appellants brief

This matter will be **presented** for ruling **without oral argument.** Any response must be filed by opposing counsel on or before September 11, 1996. Counsel will be notified by mail after the Court has ruled.

Sincerely,

CHARLES R. FULBRUGE III,
Clerk

By: /s/ Nancy Dolly
Nancy Dolly,
Deputy Clerk

cc: Mr M R Mikkilineni
Ms Michel D Siemer
Ms Andrea Chan
Ms Eleanor Ann Robinson-Gaither

P. S. to counsel filing pleadings: Unless the pleading is purely procedural and/or a certificate of interested persons has already been submitted, please send the certificate required by Local Rule 27.5 by the date above.

P P S To Mikkilinen: The question regarding jurisdiction should be addressed in your brief which is currently due September 17, 1996. Your petition for review (appeal) has been forwarded to the section in this office that handles agency appeals.

MOT-1

APPENDIX B

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT
OFFICE OF THE CLERK

TEL. 504-589-6514
CHARLES R. FULBRUGE III **600 CAMP STREET**
CLERK **NEW ORLEANS, LA 70130**

December 12, 1996

Mr M R Mikkilineni
2499 Elkridge Drive
Wexford, PA 15090

No. 96-20471 Mikkilineni v. The City of Houston
USDC No. CA-H-94-3552

Your brief and record excerpts have been received but not filed, since motions to file out of time and to file in excess of pages are required. These motions should be received within 10 days.

Sincerely,

CHARLES R. FULBRUGE III,
Clerk

By: /s/ Carol G. LeSage
Carol LeSage,
Deputy Clerk

cc: Ms Michel D Siemer
Ms Andrea Chan
Ms Eleanor Ann Robinson-Gaither

BR-5

APPENDIX C

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT
OFFICE OF THE CLERK

TEL. 504-589-6514
CHARLES R. FULBRUGE III 600 CAMP STREET
CLERK NEW ORLEANS, LA 70130

December 13, 1996

Mr M R Mikkilineni
2499 Elkridge Drive
Wexford, PA 15090

No. 96-20471 Mikkilineni v. The City of Houston
USDC No. CA-H-94-3552

Regarding the case above, the following has been filed:

Motion filed by Appellees, The City of Houston, Gary Oradat, Russell Mai, Denis Lloyd, and Philip Barnard to strike appellant's brief and dismiss appeal

This matter will be **presented** for ruling **without oral argument.** Any response must be filed by opposing counsel on or before 12/20/96. Counsel will be notified by mail after the court has ruled.

Sincerely,

CHARLES R. FULBRUGE III,
Clerk

By: /s/ Carol G. LeSage
Carol LeSage,
Deputy Clerk

cc: Ms Andrea Chan
Ms Eleanor Ann Robinson-Gaither

P.S. to counsel filing pleadings: Unless the pleading is purely procedural and/or a certificate of interested persons has already been submitted, please send the certificate required by Local Rule 27.5 by the date above.

MOT-1

APPENDIX D

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT
OFFICE OF THE CLERK

TEL. 504-589-6514
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December 20, 1996

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US Attorney's Office
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910 Travis
PO Box 61129
Houston, TX 77208

No. 96-20471 Mikkilineni v. The City of Houston
USDC No. CA-H-94-3552

Regarding the case above, the following has been filed:

> Motions filed by Appellant M R Mikkilineni for leave to file brief/record excerpts out of time, to file oversize brief of 68 pages/record excerpts of 300 pages

This matter will be **presented** for ruling **without oral argument.** Any response must be filed by opposing counsel on or before 12/27/96. Counsel will be notified by mail after the court has ruled.

Sincerely,

CHARLES R. FULBRUGE III,
Clerk

By: /s/ Carol LeSage/tdc
Carol LeSage,
Deputy Clerk

/tdc
cc: M R Mikkilineni

P.S. to counsel filing pleadings: Unless the pleading is purely procedural and/or a certificate of interested persons has already been submitted, please send the certificate required by Local Rule 27.5 by the date above.